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Supreme Court of the United States

OCTOBER TERM, 1967

NO. ——

DAN W. DREW,
Petitioner

versus

RUFUS B. LAWRIMORE, T. B. CUNNINGHAM and J. B. COOK, as the Marketing Quota Review Committee, Area of Venue No. 5, State of South Carolina, of the United States Department of Agriculture; ORVILLE L. FREEMAN, Secretary of Agriculture of the United States of America; PAUL W. KOWALSKI, CHARLES E. CALHOUN, MILLS P. TUTEN and C. B. PLAYER, JR., as the State Agricultural Stabilization and Conservation Committee for the State of South Carolina of the United States Department of Agriculture; and J. EVAN GOODYEAR, PAUL RICHARDSON and W. F. PAGE, as the County Agricultural Stabilization and Conservation Committee for Marion County of the United States Department of Agriculture

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

E. N. Zeigler, Attorney, on behalf of Dan W. Drew, petitions for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 19, 1967.

OPINION BELOW

The opinion of the Court of Appeals (App. A, infra, pp. 1a-8a) is reported at — F. 2d —. The initial Order of the Honorable Robert W. Hemphill, Judge of the United States District Court for the District of South Carolina, dated August 25, 1966, is reported in 257 F. Supp. 659 and is printed on page 3a of the Appendix for the Appellants. Judge Hemphill's subsequent Orders dated September 12, 1966, and November 18, 1966, are to be found in the Appendix for the Appellants at pages 44a and 52a respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on June 19, 1967 (App. B, infra, p. 9a). On July 28, 1967, Chief Judge C. F. Haynsworth entered an Order dated July 28, 1967, staying the issuance of a certified copy of the judgment of the Court pending application for a writ of certiorari (App. C, infra, p. 10a). The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254 (1).

QUESTIONS PRESENTED

Where statutory review is sought under the provisions of 7 U.S.C.A. 1365 and 1366, is the United States Department of Agriculture bound by the record taken before its Review Committee and certified to the District Court as to issues joined and tried in those proceedings?

Is the Appellee Dan W. Drew denied due process of law under the Constitution of the United States of America by the Court of Appeals' reversal of the Order of the District Court where the Court of Appeals makes findings of fact based on unsworn state-

ments and representations made outside the review record prescribed by statute?

STATUTES AND REGULATIONS INVOLVED

The Federal statutes and regulations involved in this case are collected in Appendix D, infra, pp. 11a-18a.

Central to the issues presented are the provisions of the Soil Conservation and Domestic Allotment Act of 1935, as amended, and the Agricultural Adjustment Act of 1938, as amended, insofar as they set up a system for administering flue-cured tobacco acreage allotments and marketing quotas. Of particular importance are the provisions of the Soil Conservation and Domestic Allotment Act of 1938 contained in 16 U.S.C.A. 590g, and 16 U.S.C.A. 590h (b). These provisions are supplemented by 7 U.S.C.A. 1365 and 7 U.S.C.A. 1366, which establish a system of appeals for farmers dissatisfied with determinations made by the various committees established in regulations issued by the Secretary of Agriculture.

Although all relevant statutes and regulations are printed in the Appendix this case deals primarily with the portion of the Agricultural Adjustment Act of 1938, as amended, as follows:

7 U.S.C.A. 1366. *Court review.*

> The review by the court shall be limited to questions of law, and the findings of fact by the review committee, if supported by evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce

such evidence in the hearing before the review committee, the court may direct such additional eivdence to be taken before the review committee in such manner and upon such terms and conditions as to the court may seem proper. The review committee may modify its findings of fact or its determination by reason of the additional evidence so taken, and it shall file with the court such modified findings or determination, which findings of fact shall be conclusive. At the earliest convenient time, the court, in term time or vacation, shall hear and determine the case upon the original record of the hearing before the review committee, and upon such record as supplemented if supplimented, by further hearing before the review committee pursuant to direction of the court. The court shall affirm the review committee's determination, or modified determination, if the court determines that the same is in accordance with law. If the court determines that such determination or modified determination is not in accordance with law, the court shall remand the proceeding to the review committee with direction either to make such determination as the court shall determine to be in accordance with law or to take such further proceedings as, in the court's opinion, the law requires.

STATEMENT

A. The Statutory and Regulatory Program

This case, involving the determination of a tobacco farmer's acreage allotment and marketing quota, requiring the interpretation of the statutory and regulatory administrative program contained in the Agricultural Adjustment Act of 1938, as amended, and those parts of the Soil Conservation and Domestic Allotment Act of 1935, as amended, which deal with the creation of administrative areas within the states [16 U.S.C.A. Sec. 590g and Sec. 590h (b), App. D,

infra, pp. 13a-14a]. The program of tobacco allotments is administered by the Secretary of Agriculture through a committee system which came into a unified structure through a combination of the provisions of the two Acts.

In point of time, the Soil Conservation and Domestic Allotment Act of 1935 came first. Its general purposes are set forth in 16 U.S.C.A. 590g. Sec. 590h (b) (App. D, infra, pp. 13a-14a) directs the Secretary of Agriculture in carrying out the provisions of the Act to utilize the committees which are set up in subsequent portions of the section. These committees were initially the State Committee, the County Committee, and local or "community" committees. The Secretary of Agriculture is given the power to make regulations governing these committees and to regulate the agricultural programs through them. The review committee was first created under provision of the Agricultural Adjustment Act of 1938, 7 U.S.C.A. 1363 (App. D, infra, pp. 18a-19a). Court review of decisions on allotments are provided for in 7 U.S.C.A. 1365, and the nature and scope of court review is provided in 7 U.S.C.A. 1366 (App. D, infra, pp. 11a-12a). It is admitted by the defendant Department of Agriculture that its agents failed to establish community boundaries as required by statute and regulations.

B. Statement of Facts

This action arises because of the failure of the Department of Agriculture, acting through its various agencies, to determine community boundaries in Marion County, South Carolina, as required by law for the administration of the government's tobacco program. The effect of the failure to establish physi-

cal boundaries for local administrative areas known as "communities" did not become important until 1965 when the acreage poundage amendment to the Agricultural Adjustment Act of 1938 was passed. 7 U. S. C. A. 1314 (Supp. 1366) (App. D, p. 15a). Mr. Drew, a large tobacco farmer, whose address is Route 1, Mullins, South Carolina, and whose voting precinct is South Mullins, lives in an area where three "communities" corner midway between the Town of Marion and the Town of Mullins. If his community designation is "Marion Community" then he would have approximately ten thousand (10,000) pounds less tobacco allotment than if his community designation was either "Rains Community" or "South Mullins Community."

Drew was unable to get either the local Agricultural Stabilization and Conservation Office, in Marion County, hereinafter referred to as the Marion County ASC Office, or the State Agricultural Stabilization and Conservation Office, hereinafter designated as State ASC Office, to locate any physical boundaries separating Marion, South Mullins and Rains Communities. His remedy as a tobacco farmer dissatisfied with his marketing quota is clearly defined by statute [7 U.S.C.A. Section 1365 (App. D, infra, p. 11a)].

C. Proceedings Before ASC Review Committee

In due course a hearing was held before the Review Committee in Marion County on June 26, 1966. At that hearing the Defendant Marion County ASC Committee appeared and answered, denying "vehemently" that they or "The State Committee acted arbitrarily, capriciously, or in abuse of discretion in fixing community boundaries * * *." It is clear from

the record taken before the Review Committee that the Marion County and State ASC Committees as parties to the proceedings before the Review Committee produced no evidence of a map showing community boundaries, offered no evidence to support any rational administrative policy for placing the Drew farms in Marion Community and offered no evidence to rebut the scientific evidence offered by Drew's witnesses.

It was the position of Drew that the purposes stated in 16 U.S.C.A. 590g (App. D, infra, pp. 13a-14a), establishing as the policy of the law the "promotion of economic use and conservation of land," and the "diminution of exploitation and wasteful and unscientific use of national soil resources," were controlling and that the Secretary of Agriculture, in establishing community boundaries under the authority of the Soil Conservation and Domestic Allotment Act of 1935, was bound by these provisions.

The Review Committee took a patently arbitrary attitude toward the testimony offered by Drew to show the natural features of Marion County which should be used as a basis for determining where community boundaries should have been located in December, 1965, at the time his tobacco acreage allotment and marketing quota for 1966 were determined by the Marion County ASC Committee. The Review Committee foound as follows: "* * * [T]here is *no provision*, either in the Acts of Congress, or the Regulations promulgated by the Secretary of Agriculture, that provides for *any consideration* to be given to scientific or geological analysis of the soil in the determination of commnity boundaries for administrative purposes," (Emphasis supplied).

The Review Committee's findings of fact and law were adverse to Drew, and suit was filed in the United

States District Court for the District of South Carolina in accordance with the provisions of 7 U.S.C.A. 1365 (App. D, infra, p. 11a).

D. Proceedings Before United States District Court of South Carolina

Action was brought in the United States District Court for South Carolina for judicial review against the Appellants who represent the United States Department of Agriculture in various capacities with regard to the administration of acreage-poundage marketing quotas for flue-cured tobacco in South Carolina. Two interrelated causes of action are stated in the complaint. The first cause of action is one for review of the decision of the Marketing Quota Review Committee, Area of Venue No. 5, State of South Carolina, of the United States Department of Agriculture. The action is controlled by the provisions of 7 U.S.C.A. 1365 and 1366. The second cause of action is brought against the Secretary of Agriculture of the United States, the State Agricultural Stabilization and Conservation Committee for the State of South Carolina of the United States Department of Agriculture and the County Agricultural Stabilization and Conservation Committee for Marion County of the United States Department of Agriculture. It is in the nature of mandamus in which is sought specific performance of the Agricultural Adjustment Act of 1938, as amended, the Agricultural Act of 1949, as amended, and other related Acts, as well as a declaration of Appellee's rights under these laws. It is brought under the provisions of 7 U.S.C.A. 1376 (App. D, infra, pp. 12a-13a) and 28 U.S.C.A. 2201 and 1361 (App. D, infra, p. 19a).

A Rule to Show Cause why the Appellants should

not be required to establish boundary lines between the communities in Marion County as required by law was issued, and a hearing on this rule was had on August 17, 1966. Thereafter, on August 25, 1966, the Honorable Robert W. Hemphill, United States District Judge, issued an Order requiring the Appellants "to determine boundaries as and if established in December, 1965, for Marion, South Mullins and Rains Communities in Marion County, South Carolina, as required by law and regulations issued pursuant thereto, giving full consideration to the provisions of *16 U.S.C.A. 590g (a)* and such relevant physical, scientific and economic facts established in *the record of the hearing before the Marketing Quota Review Committee, * * * held on June 22, 1966*, and filed with this Court on August 12, 1966, as may have affected the use and conservation of plaintiff's land and others similarly situated." (Emphasis supplied).

The representative of the Department of Agriculture in disregard of the clear meaning of the Order of the Court, filed in the Court a map showing community boundaries different from any which they had endeavored to establish before the Review Committee and identical with a map which had been previously submitted to the District Court at the hearing on the Rule to Show Cause and which had been specifically refused by the District Court in its Order dated August 25, 1966. The District Court acting upon various motions issued an Order dated September 12, 1966, in which the actions of the defendants were found not to be in compliance with the previous Order of the Court and in which the defendants were directed to comply with the previous Order of the Court and establish boundaries upon the record certified to the District Court. At this point, the State ASC Committee had endeavored to file with the Court

a document entitled "Determination in Compliance With the Order of the Court Filed on August 25, 1966." This document was not filed with the Review Committee nor served upon counsel for Drew. It was signed by both the State ASC Committee and the Marion County ASC Committee. It purports to make determination of community boundaries upon evidence not produced at the hearing before the Reviaw Committee and evidence which if it had been offered before the Review Committee would have been inadmissible as hearsay. It establishes boundary lines completely different from those which the Department of Agriculture's witnesses endeavored to establish by sworn testimony at the hearing before the Review Committee.

Acting upon various motions and after hearing oral arguments the District Court refused to accept the actions of the defendant Department of Agriculture and issued an Order dated September 12, 1966, in which the actions of the defendants were found not to be in compliance with the previous Order of the Court and in which the defendants were directed to comply with the previous Order of the Court and make a determination upon the record before the Review Committee as required by 7 U.S.C.A. 1366. Compliance having been obtained by a redetermination of the Review Committee filed September 16, 1966, and the answer of the appellants having been filed, various motions were made by Appellants and by Appellee.

The Department of Agriculture filed various motions to vacate the Order of September 12, 1966, and in addition requested a hearing. Petitioner Drew having filed motion and suggestion of mootness, the Court by Order dated November 18, 1966, found that

the actions of the Appellant in complying with the Orders of the Court had given the Appellee the relief sought in his second cause of action and had rendered moot the first cause of action. Judgment in favor of Drew was filed on December 19, 1966.

From these three Orders of the District Court the representatives of the Department of Agriculture appealed to the Court of Appeals for the Fourth Judicial Circuit.

E. Proceedings in the Court Below

In the briefs filed by the Department of Agiculture and in oral argument before the Court of Appeals for the Fourth Judicial Circuit, the Department took the position that they did not challenge the portions of the District Court's Order setting aside the original determination of the Review Committee and directing the drawing of new boundary lines. The thrust of the appeal was directed only at those portions of the Orders of the District Court of August 25, 1966, September 12, 1966, and November 18, 1966, which required that the Department of Agriculture's agents draw the community boundaries on the evidence taken before the Review Committee and according to the Department of Agriculture's argument, on the basis of "technical natural resource factors having nothing to do with efficient administrative practice in the drawing of the new boundaries."

The position of Drew in the Court of Appeals was that the general policies stated in the Soil Conservation and Domestic Allotment Act of 1935, 16 U.S.C.A. 590g, were binding upon the Secretary of Agriculture and that the establishment of community boundaries under the provisions of 16 U.S.C.A. 590h (b)

required that the Secretary and his agents place "technical natural resource factors ahead of "administrative practice" especially in view of the enactment of 7 U.S.C.A. 1314c which, for the first time, made natural resource factors as defined in 16 U.S.C.A. 590g, economically significant to tobacco farmers. It was also the position of Drew that the provisions of 7 U.S.C.A. 1366, defining the area of Court review, were binding upon the agents of the Secretary of Agriculture and that they were not free to determine, *de novo* and *dehors* the record on file with the District Court, the very issue which had been litigated before the Review Committee and which they admitted was properly decided adversely to the Department of Agriculture.

The Court of Appeals in its decision dated June 19, 1967, reversed the District Court's decision in favor of Drew. The opinion side-stepped the issue of the effect of the language contained in 16 U.S.C.A. 590g stating that, while there was no need to decide this question, in exercising judicial restraint the Court "in no way approve the position of the District Court that natural resource factors are to be given controlling weight in determining the boundaries of local administrative areas." (App. A, infra, p. 6a).

The issue of the binding effect of the record made before the Review Committee which formed the only basis of the proceeding before the District Court under the provisions of 7 U.S.C.A. 1365, 1366 (App. D, infra pp. 11a-12a) was decided adversely to Drew. But the Court of Appeals went further. Without regard for the fact that the issue of arbitrary and capricious action on the part of the State and Marion ASC Committees constituting abuse of discretion had been raised and argued in the proceeding before the

Review Committee and made an issue in the pleadings in the District Court, the decision of the Court of Appeals finds that the document filed by the Department of Agriculture with the District Court but rejected by it, which had not been filed with the Review Committee or served upon counsel for Drew, "contained no abuse of discretion by the defendants in the present case" but constituted "a deliberate and well-reasoned determination." Thus according to the reasoning of the Court of Appeals, the lengthy administrative and judicial procedure prescribed by the Agricultural Adjustment Act of 1938, as amended, 7 U.S.C.A. 1363, 1365, and 1366, could only furnish Drew a Pyrrhic victory.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. The Court of Appeals for the Fourth Circuit has failed to construe correctly a clear statement of Congressional purpose and intent contained in 16 U.S.C.A. 590g (a).

The interlocking system of committees appointed to administer the Agricultural Adjustment Act of 1938, as amended, has been previously explained. These committees are organized under the provisions of the Soil Conservation and Domestic Allotment Act of 1935. The initial provisions of that Act give a clear, unambiguous statement of Congressional intent. [See 16 U.S.C.A. 590g (a), App. D, infra, p. 13a]. It is the duty of the courts to give effect to the Congressional policies stated in 16 U.S.C.A. 590g (a). *Brotherhood of Locomotive Firemen and Enginemen v. Northern Pacific Railway Co.*, 174 F. 2d 641 (8 Cir. 1960). This is particularly true when the effect of ignoring this clear statement of Congressional pur-

pose results in severe economic hardship for Drew, as a matter of fact, wasteful overproduction which according to the testimony necessitated the destruction in 1965 of six thousand (6,000) pounds of tobacco. The necessity for a construction of the interrelationship between the purposes stated in 16 U.S.C.A. 590g (a) of the Agricultural Adjustment Act of 1938, as amended, only became a matter of critical economic concern in 1965 with the passage of an amendment to the Agricultural Adjustment Act contained in 7 U.S.C.A. 1314c (a). (App. D, infra, p. 15a). Other farmers will be similarly affected.

It is significant that 7 U.S.C.A. 1314a (5) specifically refers to the local administrative areas created under the provisions of 16 U.S.C.A. 590h. The Court of Appeals of the Fourth Circuit, it is respectfully submitted, refused to give controlling effect to the provisions of 16 U.S.C.A. 590g (a) in establishing a basis for determining the reasonableness of the Department of Agriculture's actions in determining community boundary lines in Marion County, South Carolina, which affected Drew's acreage allotment and marketing quota for the crop year 1966.

2. The appeal procedure established in the Agricultural Adjustment Act of 1938, as amended, has never been passed upon by the United States Supreme Court, and the interpretation of the Court of Appeals for the Fourth Circuit of the lack of binding force of the record in these proceedings is incorrect and would deny Drew due process of law under the Constitution of the United States of America.

The question is here involved of the validity of the appeal procedure established under the provisions of 7 U. S. C. A. 1363-1366 (App. D, infra, pp. 11a-12a).

The effect of the opinion of the Court of Appeals for the Fourth Circuit is to place the Department of Agriculture not simply above the binding effect of its own regulations, but above the clear meaning of the statutes providing appellate procedures both before the Review Committee and in the District Court.

The review procedure which a farmer who is dissatisfied with his crop allotment must follow is prescribed in 7 U.S.C.A. 1363 (App. D, infra, p. 18a). It is provided in Section 1363 that any farmer who is dissatisfied with his farm marketing quota may have such quota reviewed by a local review committee. These provisions have been construed in numerous cases to be mandatory, providing an exclusive remedy, and binding on both the farmer and the Department of Agriculture. *Chandler v. David*, 350 F. 2d 669, 676 (5 Cir. 1965); *Gladney v. Review Committee*, 257 F. Supp. 57, 60 (D.C. La., 1966). In the instant case, no issue was raised as to the right or the power of the Review Committee to maintain jurisdiction of the protest of Drew. Indeed, the question of boundary lines is one in which the Marion County ASC Committee had co-responsibility with the State ASC Committee.

Under the regulations issues by the Secretary of Agriculture, 7 C.FR. 7.20 (f) (App. D, infra, p. 16a), the county committee *shall* "Recommend to the State committee needed changes in boundaries of communities * * *." The State committee by letter advised Drew that he should take up the matter of boundary location with the county committee. (See Appellee Appendix 4A). Not only was there a requirement that the county committee make recommendations as to changes, but the county committee was permitted to do so by the answer filed with the

Review Committee. (See paragraph 3 in answer of Marion County ASC Committee, Appellee's Appendix, p. 3A). The issue of reasonableness of the location of community boundary lines was therefore properly before the Review Committee under the provisions of 7 C.F.R. 711.12 (App. D, infra, p. 17a), where it is provided that "the review committee shall consider only such matters as, under applicable provisions of the act and regulations of the Secretary, are required or *permitted to be considered* by the county committee * * *." (Emphasis supplied). See *Rigby v. Mitchell*, 152 F. Supp. 492 (D.C. Utah 1957) in which the reasonableness of regulations issued by the Department of Agriculture as they affected a wheat farmer's allotment was litigated apparently without question before a Review Committee. The question of arbitrariness and capriciousness was tried before the Review Committee without objection on the part of the Department of Agriculture, but the District Court found that the testimony offered by the Department of Agriculture's witnesses at the hearing before the Review Committee was contradictory and lacking in credibility. *Drew v. Lawrimore*, 257 F. Supp. 659, 665. The District Court found that on the record before it filed in accordance with the provisions of 7 U.S.C.A. 1365 (App. D, infra, p. 11a), the Department of Agriculture's witnesses had offered no testimony to establish any "administrative convenience" which they later endeavored to rely upon. *Drew v. Lawrimore, supr*, page 667. As the opinion in the Court of Appeals points out, the Department of Agriculture does not take issue with the corerctness of the District Court's Order of August 25, 1966, in ordering that the boundary lines for that area of Marion County "should be drawn anew." (Court of Appeals decision, App. A, infra, p. 6a).

The Court of Appeals incorrectly states the question which is at the heart of the matter when it says that defendants ask that "the requirements of efficient administration, and not technical natural resource factors, are to determine the boundary lines for 'local administrative areas' created by Congress to facilitate the administration of the agricultural program." (Court of Appeals decision, App. A, infra, p. 6a). The vital question is whether the Department of Agriculture, after having tried a matter properly before its Review Committee which it concedes was correctly determined adversely to it by the District Judge on appeal, can ignore the record upon which statutory review is based and make a valid administrative determination *dehors* the record.

Again, the provisions of the statute are clear and unambiguous. It is provided in 7 U.S.C.A. 1366 (App. D, infra, p. 11a), that the only way the record filed by the Review Committee may be expanded is upon showing "to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Review Committee * * *." The District Court in its Order dated November 18, 1966, makes specific reference to the binding effect of this statutory provision upon the Department of Agriculture.

> * * * The suggestion of counsel for the defendant that a "trial" should be held in connection with the first cause of action is not tenable. This case is on appeal to this Court under the provisions of 7 U.S.C. 1366. The record on which the appeal is to be heard has been fixed. This court in its previous orders sent the matter back to the defendant Review Committee for the purpose of having it receive additional evidence and make modified findings. Neither at that time nor in

> their answer have the defendants sought to adduce additional evidence nor have they endeavored to satisfy the Court that such evidence is material and that there were reasonable grounds for the failure of the defendants to adduce such evidence in the hearing before the Review Committee held on June 22, 1966. (Appendix for Appellants, p. 57a).

It is well established case law that both the farmer and the Department of Agriculture are bound by the record filed by the Review Committee when appeal is sought under the provisions of 7 U.S.C.A. 1365-1366. *Smith Land Co. v. Christensen*, 148 F. 2d 184 (10 Cir. 1945). It is also well established that the Department of Agriculture must follow the regulations which it has issued for procedure before the Review Committee even though the Department might have the authority to exercise discretion at a later time and revise those regulations. *Kephart v. Wilson*, 219 F. Supp. 801 (D.C. W.D. Texas, 1963).

What the Court of Appeals has done is to confirm the Order of Judge Hemphill in setting aside the decision of the Review Committee but to deny to the District Court the specific powers granted to it by 7 U.S.C.A. 1365, that is, the power of an equity judge, and the powers detailed in 7 U. S. C. A. 1366, that is, "* * *[I]f the court determines that such determination or modified determination is not in accordance with law, the court shall remand the proceedings to the Review Committee with directions either to make such determination as the court shall determine to be in accordance with law or to take *such further proceedings, as in the court's opinion, the law requires.*" (Emphasis supplied).

More than this, the Court of Appeals has sanctioned the proposition that the Department of Agri-

culture may go outside the record (as defined in 7 U.S.C.A. 1365-1366) to take additional evidence and statements on issues of fact tried before the Review Committee. The Court gives sanction to this unorthodox procedure on the assumption that the State Committee's determination does not have to be made on a record and is committeed to the discrétion of the Secretary of Agriculture.

It is submitted that the Court of Appeals for the Fourth Circuit has confused the necessity of a "record" when and if the Department of Agriculture were determining community boundary lines as initial matter on its own initiative, and the "record" established before the Review Committee and filed with the District Court in compliance with 7 U.S.C.A. 1365 (App. D, infra, p. 11,), in the words of the statute "the record upon which the determination complained of was made, * * *." There can be no other "record" under the terms of 7 U.S.C.A. 1365. This record must be the one on which the reasonableness of the Department's actions must be judged. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Security & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87; 63 S. Ct. 454, 459; 87 L. Ed. 626 (1943).

The acceptance of the document entitled "Determination in Compliance With the Order of the Court Filed August 25, 1966" (Appellants' Appendix, pp. 28a-42a), violates not only the statute, but the fundamental right of Drew to cross-examine the persons on whom the Department relies in reaching its conclusions.

> * * * Certain principles have remained relatively immuatable in our jurisprudence. One of these

is that where governmental action seriously injures an individual, and the reasonableness of the action depends on the fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirement of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e. g., Mattox v. United States, 156 U. S. 237, 242-244, 15 S. Ct. 337, 339-340, 39 L. Ed. 409; Kirby v. United States, 174 U. S. 47, 19 S. Ct. 574, 43 L. Ed. 890; Motes v. United States, 178 U. S. 458, 474, 20 S. Ct. 993, 999, 44 L. Ed. 1150; In re Oliver, 333 U. S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682, but also in all types of cases where administrative and regulatory actions were under scrutiny. E. g., Southern R. Co. v. Commonwealth of Virginia, 290 U. S. 190, 54 S. Ct. 148, 78 L. Ed. 260; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093; Morgan v. United States, 304 U. S. 1, 19, 58 S. Ct. 773, 776, 999, 82 L. Ed. 1129; Carter v. Kubler, 320 U. S. 243, 64 S. Ct. 1, 88 L. Ed. 26; Reilly v. Pinkus, 338 U. S. 269, 70 S. Ct. 110, 94 L. Ed. 63. *Green v. McElroy*, 79 S. Ct. 1400, 1413, 360 U. S. 474, 3 L. Ed. 1377 (1959).

See also *Giant Food, Inc. v. F. T. C.*, 322 F. 2d 977 (C.A.D.C. 1963), 116 U. S. App. D.C. 227, Certiorari denied, 84 S. Ct. 1121, 376 U S. 967, 12 L. Ed. 2d 82.

3. A potential conflict exists between various jurisdictions as to the power of the review committees set up under the Agricultural Adjustment Act of 1938, as amended, which should be resolved by the Supreme Court.

Generally the Courts have regarded the question of review in a case of this type from two points of view. The first is, the necessity of beginning with proceedings before the Review Committee as a part of the exhaustion of remedies, the second, the scope of powers of the Review Committee.

An early case reaching the District Court is *Fulford v. Foreman*, 245 F. 2d 145 (5 Cir. 1957), in which the Court discusses the power of the Review Committee to review disparities in cotton allotments between different sections of the State of Texas as established by the State ASC Committee and holds that the Review Committee in such circumstances does not have power to act. In contrast with *Fulford*, the issue here is local and personal. The distinction in the rule as found in *Fulford* is clearly spelled out in *Chandler v. David*, 350 F. 2d 669 (5 Cir. 1965).

In *Chandler*, it was argued that the exclusive mechanism of proceeding through the Review Committee was inapplicable, because the County Committee, although required to make the initial determination whether a transfer of rice allotments was obtained by misrepresentation, did not in substance take any independent action to cancel the allotments. It was argued unsuccessfully upon the authority of *Morrow v. Clayton*, 326 F. 2d 36 (10 Cir. 1963), and *Fulford v. Foreman, supra*, that the Review Committee only has jurisdiction to review bona fide actions of the County Committee, and has no power to supervise the actions of the State Committee. The Court stated

that it took no such narrow view of the review provisions of Section 1363-1366 of Title 7, making clear the distinction between review of local matters upon which the County Committee has acted and statewide administrative policy decisions by the State Committee, as follows:

> * * * The questions presented here are not comparable in scope and impact to those in Fulford v. Foreman, supra, in which action of the state ASCS officials relating to the statewide policy of apportioning acreage allotments among various sections of the state was drawn into question. Instead, the present controversy relates to action which affects only the marketing quotas and acreage allotments of certain individual farmers. As such, it is a matter properly to be considered by the County Committee and reviewed by the Review Committee.
>
> Indeed, we think our decision in the instant case is controlled directly by our earlier decision in Allen v. David, supra. There we asked to review a county committee's cancellation of certain rice allotments prior to exhaustion of the administrative remedy provided by section 363. The action there was induced by the State Committee. We nevertheless held that the right of appeal to the Review Committee had to be exhausted prior to the institution of a proceeding to obtain court review of the agency's action, whether such action was induced, influenced, or instigated by state ASCS officials.
>
> Morrow v. Clayton, supra, is distinguishable. There, the County Committee refused to take any action to cancel the allotments in question, and the State Administrator issued the revised allotment notices himself. In that case, there was no County Committee action which the Review Committee could consider. In addition, that opinion indicates that the cancellations involved may have been part of a statewide policy formulated

by the State officials which the Tenth Circuit believed brought the case within the rationale of Fulford v. Foreman, supra. No similar contention has been advanced here. *Chandler v. David, supra*, p. 677.

In view of the importance of a fair review of the Department's actions to Drew and other farmers and in view of the uncertainty of the procedural routes to be followed, it is submitted that the Supreme Court should review these decisions.

CONCLUSION

The decision below if allowed to stand will seriously undermine the effectiveness of review procedures established by 7 U.S.C.A. 1365 and 1366. There is an uncertainty if not an outright conflict in the decisions of the various Courts of Appeal dealing with these provisions of the law which should be resolved. Substantial economic loss has resulted to petitioner and will result to other farmers under the provisions of the Acreage-Poundage Amendment to the Agricultural Act of 1938, as amended, unless there is clarification of the review procedure. Drew will be denied due process of law if the opinion of the Court of Appeals is allowed to stand, in that he is denied the opportunity to see and attack the evidence which the Department of Agriculture claims will justify a result different from that required by Order of the District Court.

Respectfully submitted.

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Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 11,117

Dan W. Drew,
Appellee

versus

Rufus B. Lawrimore, *et al*,
Appellants

Appeal from the United States District Court for the District of South Carolina, at Columbia, Robert W. Hemphill, District Judge

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(Argued May 3, 1967. Decided June 19, 1967.)

Before Haynsworth, Chief Judge, and Winter and Craven, Circuit Judges

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Norman Knopf, Attorney, Department of Justice, (Barefoot Sanders, Assistant Attorney General, Alan S. Rosenthal, Attorney, Department of Justice, and Terrell L. Glenn, United States Attorney, on brief) for Appellants, and E. N. Zeigler for Appellee

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CRAVEN, Circuit Judge:

This is an appeal from three orders of the district court which compel the Secretary of Agriculture and members of various Agricultural and Conservation Service (ASC) committees to establish new boundary lines for "local administrative areas" used in the administration of the tobacco marketing program.

This action was brought by Dan Drew, a Marion County, South Carolina, flue-cured tobacco grower, in an attempt to gain a higher tobacco quota for his farm. Since, by statute, the size of a tobacco quota depends in part upon the "local administrative area" or "community" in which a farm is situated,[1] Drew sought to have the boundary lines for Marion County communities redrawn so as to place his farm in a different administrative area and thus achieve a higher quota.

In its order of August 25, 1966, the district court held that the defendants were required by law to establish boundary lines for the Marion, South Mullins, and Rains Communities in Marion County as of December 1965, but that "no physical boundaries for [these] communities had been established * * *." The district court further held that in establishing these boundaries the defendants were to give consideration to natural resource factors affecting the use of the land.[2] The defendants were directed to determine

[1] Until 1965 "local administrative areas" or "communities" had not been of great consequence to the average farmer since they did not affect a farm's marketing quota. However, the 1965 amendments to Section 317 of the Agricultural Adjustment Act of 1938, 7 U.S.C.A. § 1314(c), created a new tobacco program that for the first time utilized communities in a manner which directly affected the size of a farm's tobacco quota.

[2] This conclusion was based on the district's court's interpretation of Section 8(b) of the Soil Conservation and Domestic Allotment Act, 16 U.S.C.A. § 590h(b), which sets forth the basic administrative structure for agricultural programs and requires the Secretary to designate "local administrative areas." The district court reasoned that the broad policy considerations in Section 7(a) of the Act, 16 U.S.C.A. § 590g(a), must be read into every part of Section 8(b) of the Act. Thus, the district court concluded that the following policies, among others enumerated in Section 7(a) of the Act, should be considered in determining "local administrative areas:" preservation and improvement of soil fertility; promotion of the economic use and conservation of land; and the diminution of exploitation and wasteful and unscientific use of soil resources.

boundaries for the three communities as of December 1965, "giving full consideration" to conservation and economic policies in Section 8(b) of the Soil Conservation and Domestic Allotment Act,[3] and to "relevant physical, scientific and economic facts established * * * before the * * * [local] Review Committee, * * * as may have affected the use and conservation of [Drew's] land and other land similarly situated."[4] Defendants were ordered to file with the court a map showing the new boundary lines within ten days.

The defendants made the determination of boundaries between the communities in question and filed with the district court a map on which these were shown along with a lengthy explanation of their determinations. The defendants listed the various matters considered in constructing the boundaries. These included, in addition to pertinent statutes and regulations of the Department of Agriculture, the record

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[3] 16 U.S.C.A. § 590g(a). See note 2 *supra*.

[4] The local Review Committee, established pursuant to 7 U.S.C.A. Section 1363 for the purpose of reviewing marketing quotas of dissatisfied farmers, had conducted an administrative hearing in June 1966 on plaintiff Drew's quota. Drew produced Dr. H. P. Cooper, former Dean of the Clemson University School of Agriculture, who testified about various geological and weather factors operating in Marion County. On the basis of these factors, Dr. Cooper drew a line purporting to represent a natural drainage divide and weather line in the county. He was of the opinion that farms east of the line were generally better suited for tobacco production than farms west of it.

Drew's farm is located east of this line while most of the Marion Community, in which Drew's farm was originally placed, was located west of the line. Thus, the Marion community "average yield," which is determinative of the maximum marketing quotas for the farms in the community, was based upon production of farms primarily located west of the line. Dr. Cooper concluded that it was "wasteful" and "unscientific" to determine Drew's production in connection with the lands west of the line. He believed the use of the land would be more "economic," in terms of income to the farm, if the farm were grouped with those east of the line.

before the local Review Committee and other relevant information with respect to weather and soils in Marion County.

The defendants explained that all maps relating to the establishment of communities in Marion County prior to 1966 had been lost or destroyed inadvertently under a five-year disposal program for old records. But in their judgment, considering the multiple relevant circumstances,

> "in establishing community boundary lines as of December 1965 the lines of the then existing communities should be reestablished as nearly as possible from existing data * * *. It is found that by so doing the communities thus established meet reasonable requirements with respect to territory and workload and also give effect to natural resource boundaries such as the Little Pee Dee river * * *."

The defendants stated in their explanation that they took into consideration "insofar as is reasonably feasible" the provisions of Section 7(a) of the Soil Conservation and Domestic Allotment Act, 16 U.S.C.A. 590g(a).

The defendants, after analyzing various natural resource factors in Marion County, observed in their explanation that

> "yields of flue-cured tobacco within 9 separate areas [communities] in the county vary widely between individual farms in the area but in each area there are farms that compare with farms in other areas. Since soil types are not uniform

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Dr. Cooper acknowledged that his testimony was in good part mere theory, and that differing capabilities of farmers could result in a farm west of the line raising as much tobacco as one east of it.

> on individual farms and the weather bureau records reflect adequate rainfall, it is not considered feasible to set up communities based on differences in soil or weather. * * * [V]ariations in yields are chiefly attributable to the cultural practices of the individual farmer such as the application of fertilizer and the spacing of plants together with the ability of the farmer to get the necessary work done on time and in a husband-like manner."

The defendants conclude that though they are not in a position to pinpoint these individual practices, the community boundaries established by them "result in reasonable community yields both in amount and in relation to each other and require less than the average number of adjustments when compared with the State or country as a whole."[5]

The district court in an order of September 12, 1966, responding to a motion to confirm the new boundaries, rejected the boundaries established by the defendants. The district judge held that the "record and applicable law require that the line between Marion Community and/or Rains and South Mullins Communities should follow as closely as practicable * * *" a specific line appearing in plaintiff Drew's exhibits which purported to represent the natural

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[5] Defendants noted that as these Marion County communities were constituted, farms with similar histories of tobacco production were grouped together. Thus over 84% of the farms in the county had tobacco production that was within the 80-120% critical limits of the average tobacco production for the community in which that farm was located. Only 16% of the farms needed to have their tobacco production figures adjusted (only 9% downward) in Marion County as compared with 21% nationally.

The Marion community in which Drew's farm was located is composed of high producing farms like his. The community average is higher than 69% of the flue-cured tobacco communities in the country.

drainage divide and weather line in Marion County.[6] The district court then required the defendants, under threat of contempt, to redraw the boundaries in question within four days in accord with the opinion expressed in its order. The defendant complied with the court's order, but filed timely notices of appeal. In an additional ruling on November 18, 1966, the district court declined to vacate its earlier orders.

Under the boundaries established by the defendants to meet the district court's order of August 25, 1966, plaintiff Drew's farm was located in Marion Community. The court-directed boundaries of September 12 placed Drew's farm in the South Mullins Community.

On this appeal the defendants do not take issue with the conclusion in the district court's order of August 25, that the boundary lines for the Marion County communities in question should be drawn anew. They ask us, however, to decide that the requirements of efficient administration, and not technical natural resource factors, are to determine the boundary lines for "local administrative areas" created by Congress to facilitate the administration of the agricultural program.

We need not decide this question. But in exercising restraint we in no way approve the position of the district court that natural resource factors are to be given controlling weight in determining the boundaries of "local administrative areas."

We believe it clear that the defendants gave consideration to natural resource factors in establishing community boundaries pursuant to the district court order of August 25, and, therefore, the district court

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[6] See note 2 *supra*.

erred in refusing to accept their determinations. The designation of "local administrative areas" is entrusted to the Secretary of Agriculture, who has delegated this authority, as directed by statute, to state and county ASC committees.[7] The explanation which accompanied the determination of boundaries for the Marion, Rains, and South Mullins communities pursuant to the order of August 25, disclosed that full consideration was given by the State and Marion County ASC Committees to the natural resource policies and factors as directed by the district court. The defendants established boundaries which they believed fair to the farmers within the communities and reasonable in view of the overall operations and purposes of the farm programs.

The district court, notwithstanding compliance with the law as interpreted by it, refused to accept the reasonable administrative determination, and instead substituted its own.

We noted in *Sleeth v. Dairy Prods. Co.*, 228 F. 2d 165, at 167-68 (4th Cir. 1955), that the rule is well established that

> "courts will not issue a mandamus or other order to control the action of an executive or administrative officer in the discharge of statutory duties involving the exercise of judgment or discretion, unless the attempted performance of the duty amounts to an abuse of discretion. * * *

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[7] Section 8(b) of the Soil Conservation and Domestic Allotment Act, 16 U.S.C.A. § 590h(b), provides that "The Secretary [of Agriculture] shall designate local administrative areas as units for administration of programs under this section." It also provides that "[i]n carrying out the provisions of this section * * * the Secretary is directed to utilize the services of local and State Committees * * *."

> "[An order] will lie to compel officers with discretionary duties to take action, but it will not interfere with the exercise of their discretion unless their action is illegal, or is an arbitrary or capricious abuse of such discretion."

Accord, e.g., Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317-19 (1958); *Ayrshire Collieries Corp. v. United States*, 335 U.S. 533, 592-93 (1949); *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925). In *Freeman v. Brown*, 342 F. 2d 205, 214-15 (5th Cir. 1955), the Secretary of Agriculture had not classified a certain variety of tobacco as a separate kind for the purpose of arriving at marketing quotas. The Fifth Circuit held that the district court correctly ordered reconsideration by the Secretary because he "departed from what is required of him by statute: to keep statistics and consider the latest available statistics in making the determination as to kind when arriving at marketing quotas." 342 F 2d at 214. However, the district court order was held to have gone "beyond what is warranted by the evidence and in fact amounts to the setting of a marketing quota by the court." *Id.* Instead "[t]he Secretary must make a decision and his decision, if reviewed after he follows the statutory mandates, will be on the basis of whether he has abused his discretion in the decision." *Id.* at 215.

There was no abuse of discretion by the defendants in the present case but a deliberate and well-reasoned determination. Accordingly, the district court orders appealed from of September 12 and November 18, 1966, are

Reversed.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 11,117

Dan W. Drew,
Appellee

versus

Rufus B. Lawrimore, *et al*,
Appellants

Appeal from the United States District Court
for the District of South Carolina

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court appealed from, in this cause, be, and the same are hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of South Carolina, at Columbia, for further proceedings not inconsistent with the opinion of the Court filed herein.

J. BRAXTON CRAVEN, JR.
United States Circuit Judge

Filed June 19, 1967.
MAURICE S. DEAN
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 11,117

Dan W. Drew,
Appellee

versus

Rufus B. Lawrimore, *et al*,
Appellants

Appeal from the United States District Court for the District of South Carolina, at Columbia

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Upon consideration of the motion of the appellee, by his counsel, for a stay of the mandate, the opposition to the motion by counsel for the appellants, and the reply of the appellee to the opposition to his motion,

It is ordered that the issuance of a certified copy of the judgment of this Court in lieu of a mandate be, and it is hereby, stayed pending application to the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for a writ of certiorari is filed in the said Supreme Court within the time prescribed by law.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

Filed July 28, 1967
MAURICE S. DEAN
Clerk

APPENDIX D

STATUTES AND REGULATIONS

7 U.S.C.A. 1365. *Institution of proceeding for court review of committee findings.*

If the farmer is dissatisfied with the determination of the review committee, he may, within fifteen days after a notice of such determination is mailed to him by registered mail or by certified mail, file a bill in equity against the review committee as defendant in the United States district court, or institute proceedings for review in any court of record of the State having general jurisdiction, sitting in the county or the district in which his farm is located, for the purpose of obtaining a review of such determination. Bond shall be given in an amount and with surety satisfactory to the court to secure the United States for the costs of the proceeding. The bill of complaint in such proceeding may be served by delivering a copy thereof to any one of the members of the review committee. Thereupon the review committee shall certify and file in the court a transcript of the record upon which the determination complained of was made, together with its findings of fact.

7 U.S.C.A. 1366. *Court review.*

The review by the court shall be limited to questions of law, and the findings of fact by the review committee, if supported by evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the review committee, the court may direct

such additional evidence to be taken before the review committee in such manner and upon such terms and conditions as to the court may seem proper. The review committee may modify its findings of fact or its determination by reason of the additional evidence so taken, and it shall file with the court such modified findings or determination, which findings of fact shall be conclusive. At the earliest convenient time, the court, in term time or vacation, shall hear and determine the case upon the original record of the hearing before the review committee, and upon such record as supplemented if supplemented, by further hearing before the review committee pursuant to direction of the court. The court shall affirm the review committee's determination, or modified determination, if the court determines that the same is in accordance with law. If the court determines that such determination or modified determination is not in accordance with law, the court shall remand the proceeding to the review committee with direction either to make such determination as the court shall determine to be in accordance with law or to take such further proceedings as, in the court's opinion, the law requires.

7 U.S.C.A. 1376. *Court jurisdiction; duties of United States Attorneys; remedies and penalties as additional.*

The several district courts of the United States are vested with jurisdiction specifically to enforce the provisions of this subchapter. If and when the Secretary shall so request, it shall be the duty of the several United States attorneys in their respective districts, under the direction of the Attorney General, to institute proceedings to collect the penalties provided in this subchapter. The remedies and penalties provided

for herein shall be in addition to, and not exclusive of, any of the remedies or penalties under existing law.

16 U.S.C.A. 590g. *Additional policies and purposes of chapter—Purposes enumerated.*

(a) It is declared to be the policy of this chapter also to secure, and the purposes of this chapter shall also include, (1) preservation and improvement of soil fertility; (2) *promotion of the economic use and conservation of land;* (3) *diminution of exploitation and wasteful and unscientific use of national soil resources;* (4) the protection of rivers and harbors against the results of soil erosion in aid of maintaining the navigability of waters and water courses and in aid of flood control; and (5) reestablishment, at as rapid a rate as the Secretary of Agriculture determines to be practicable and in the general public interest, of the ratio between the purchasing power of the net income per person on farms and that of the income per person not on farms that prevailed during the five-year period August 1909-July 1914, inclusive, as determined from statistics available in the United States Department of Agriculture, and the maintenance of such ratio. * * *. (Emphasis added).

16 U.S.C.A. 590h (b). *Payments and grants of aid; local, county, State Committees; rules and regulations.*

Subject to the limitations provided in subsection (a) of this section, the Secretary shall have power to carry out the purposes specified in clauses (1), (2), (3), (4), and (5) of section 590g (a) of this title by making payments or grants of other aid to agricultural producers, including tenants and sharecroppers, in amounts determined by the Secretary to be fair and

reasonable in connection with the effectuation of such purposes during the year with respect to which such payments or grants are made, and measured by (1) their treatment or use of their land, or a part thereof, for soil restoration, soil conservation, or the prevention of erosion; (2) changes in the use of their land; (3) their equitable share, as determined by the Secretary, of the normal national production of any commodity or commodities required for domestic consumption; or (4) their equitable share, as determined by the Secretary, of the national production of any commodity or commodities required for domestic consumption and exports adjusted to reflect the extent to which their utilization of cropland on the farm conforms to farming practices which the Secretary determines will best effectuate the purposes specified in section 590g (a) of this title; or (5) any combination of the above. Clauses (1) and (2) above shall be construed to cover water conservation and the beneficial use of water on individual farms, including measures to prevent run-off, the building of check dams and ponds, and providing facilities for applying water to the land. In determining the amount of any payment or grant measured by (1) or (2) the Secretary shall take into consideration the productivity of the land affected by the farming practices adopted during the year with respect to which such payment is made. In carrying out the provisions of this section in the continental United States, except in Alaska, the Secretary is directed to utilize the services of local and State committees selected as hereinafter provided. The Secretary shall designate local administrative areas as units for administration of programs under this section. No such local area shall include more than one county or parts of different counties. * * *.

7 U.S.C.A. 1314c. *Acreage-poundage quotas—Definitions.*

(a) For purposes of this section * * *.

(5) The "community average yield" means for flue-cured tobacco the average yield per acre in the community designated by the Secretary as a local administrative area under the provisions of section 590h (b) of Title 16 which is determined by averaging the yields per acre for the three highest years of the five years 1959 to 1963, inclusive, except that if the yield for any of the three highest years is less than 80 per centum of the average for the three years then that year or years shall be eliminated and the average of the remaining years shall be the community average yield * * *.

7 U.S.C.A. 1388. *Utilization of local agencies.*

(a) The provisions of section 590h (b) * * * of Title 16, relating to the utilization of State, county, local committees, * * * shall apply in the administration of this chapter; and the Secretary shall, for such purposes, utilize the same local, county, and State committees as are utilized under section * * * 590g, * * * of Title 16. The local administrative areas designated under section 590h (b) of Title 16, for the administration of programs under * * * Title 16, and the local administrative areas designated for the administration of this chapter shall be the same.

7 C.F.R. 7.7:

Each county shall be divided into local administrative areas, referred to in this subpart as "communities." * * * The boundaries of the communities shall be fixed by the State committee after considering any

recommendations by the county committee. No such community shall include more than one county or parts of different counties.

7 C.F.R. 7.20:

The County committee, subject to the general direction and supervision of the State committee, and acting through community committeemen and other personnel, shall be generally responsible for carrying out in the county the agricultural conservation program, the price support programs as assigned, the acreage allotment and marketing quota programs, the wool incentive payment program, the programs under the Soil Bank Act, and except in the State of Hawaii the sugar program formulated pursuant to the acts of Congress specified in § 7.3 and any other program assigned to it by the Secretary of Agriculture or the Congress.

In so doing the committee shall:

* * *

(d) Direct the activities of the community committees elected in the county;

(e) Pursuant to official instructions, review, approve, and certify forms, reports, and documents requiring such action under such instructions;

(f) Recommend to the State committee needed changes in boundaries of communities;

(g) Make available to farmers and the public information concerning the objectives and operations of the programs administered through the county committee;

* * *

(k) Recommend to the State committee desirable changes in or additions to existing programs;

(l) Conduct such hearings and investigations as the State committee may request * * *.

* * *

7 C.F.R. 7.22:

The community committee shall:

(a) Assist the county committee in carrying out programs assigned to it;

(b) Inform farmers concerning the purposes and provisions of programs being administered in the county by the county committee;

(c) Assist in arranging for and conducting necessary community meetings; and

(d) Perform such other duties as may be assigned to it by the county committee.

7 C.F.R. 711.12:

* * * A review committee shall have jurisdiction to hear timely filed applications respecting quotas established or denied by official written notice for farms within its area of venue. In all cases, the review committee shall consider only such matters as, under applicable provisions of the act and regulations of the Secretary, are required *or permitted to be considered* by the county committee in the establishment of the quota sought to be reviewed. (Emphasis supplied).

7 C.F.R. 724.65 (a):

All farm acreage allotments and yields shall be determined by the county committee of the county in which the farm is located and shall be reviewed by a representative of the State committee * * *.

7 C.F.R. 724.68 (c) (5):

In applying the provisions of this paragraph, a farm that is physically located in a community shall be administratively located in such community. If the farm is physically located in more than one community, the farm shall be considered as located in the community to which it was assigned when the 1965 farm acreage allotment was established on an acreage basis, or, if the farm was not assigned to a community when the 1965 farm acreage allotment was established on an acreage basis, the county committee shall locate the farm in the community in which the principal dwelling is located or where the major portion of the cropland is located, if there is no dwelling.

7 U.S.C.A. 1363. *Review of quota; review committee.*

Any farmer who is dissatisfied with his farm marketing quota may, within fifteen days after mailing to him of notice as provided in section 1362 of this title, have such quota reviewed by local review committee composed of three farmers from the same or nearby counties appointed by the Secretary. Such committee shall not include any member of the local committee which determined the farm acreage allotments, the normal yield, or the farm marketing quota for such farm. Unless application for review is made within such period, the original determination of the farm marketing quota shall be final.

28 U.S.C.A. 2201. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C.A. 1361. *Action to compel an officer of the United States to perform his duty.*

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 625

DAN W. DREW, PETITIONER

v.

RUFUS B. LAWRIMORE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Review is here sought of the court of appeals' decision upholding as a "reasonable administrative determination" (Pet. App. 7a) the location by the Department of Agriculture of certain boundary lines for "local administrative areas" used in the administration of the tobacco marketing program.

1. Petitioner, a large tobacco farmer, commenced this action in the District Court for South Carolina to obtain a higher tobacco quota for his farm by compelling the Department of Agriculture to change the "local administrative area" or "community" designation of his farm. Under the tobacco marketing program (7 U.S.C. (Supp. II) 1314c), the size of the

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tobacco acreage allotment of a farm depends in part upon the "community" in which the particular farm is located. This is so because the "average yield" of all the farms within a particular "community" is determinative of the maximum marketing quota for each farm in that "community" (7 U.S.C. 1314c(a)(5)). "Communities" are "local administrative areas" (7 C.F.R. 7.7) which the Secretary of Agriculture is authorized by statute to designate for the administration of farm programs (16 U.S.C. 590h(b)).[1] They are an essential part of the framework employed throughout the country in implementing and administering the major agricultural programs of the federal government.

By regulation the Secretary has delegated his power to designate administrative communities to the State Agricultural Stabilization and Conservation Committees (State Committees). These State Committees fix community boundaries after receiving recommendations from the County Agricultural Stabilization and Conservation Committees (County Committees) (7 C.F.R. 7.7).[2] Once community boundaries are established by the State Committee, the County Committee has the task of determining which farms are physically

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[1] "In carrying out the provisions of this section * * * [t]he Secretary shall designate local administrative areas as units for administration of programs under this section" (16 U.S.C. 590h (b)).

[2] "Each county shall be divided into local administrative areas, referred to * * * as 'communities'. * * * The boundaries of the communities shall be fixed by the State Committee after considering any recommendations by the county committee" (7 C.F.R. 7.7).

located within the various communities so established (7 C.F.R. 724.68(c)(5)), and of prescribing the quota of each farm based upon the farm's location within a particular community (7 C.F.R. 724.65(a)). The determination of a farm's quota by the County Committee may be reviewed at the request of a dissatisfied farmer by a Review Committee (7 U.S.C. 1363). The jurisdiction of a Review Committee is limited solely to those matters which a County Committee has authority to determine in establishing a quota (7 C.F.R. 711.12). The determination of the Review Committee, unlike determinations by the State or County Committees, must be based upon a record after an evidentiary hearing (7 U.S.C. 1363, 1365–66).

Petitioner regarded the quota set for him by the County Committee as improperly computed because it was based, he alleged, on an erroneous community designation of his farm. He thus sought and obtained review of his quota by the Review Committee. In the proceedings before the Review Committee, considerable conflicting evidence was introduced attempting to establish the community in which his farm was in fact located. Upon the record so established, the Review Committee affirmed the community designation of the County Committee and the quota set by the County Committee based upon this designation.

Petitioner then brought an action in the district court seeking review of this determination and relief in the nature of mandamus to compel the drawing of new community boundaries. The district court reversed the decision of the Review Committee and ordered that new community boundaries be drawn

(App. App. 3a–28a).[3] No challenge to this order was made by the government.

In compliance with the district court order, the State Committee, the sole administrative unit authorized to establish community boundaries (7 C.F.R. 7.7), drew new boundaries. Accompanying the map filed with the court showing the new boundaries was a lengthy statement by the State Committee setting forth an explanation of the factors considered in establishing the revised lines (App. App. 29a–43a). The statement noted that in setting boundaries the Committee had relied, among other things, upon records and statistics compiled by the Department of Agriculture and other governmental agencies, as well as the Committee members' first-hand knowledge and experience, and that administrative requirements, such as the number of farms in each community and natural resource factors, such as soil content and amount of rainfall, had been given careful consideration. The district court held that in determining the new boundaries the State Committee did not give proper consideration to natural resource factors. The court therefore ordered the drawing anew of community boundaries along lines specifically outlined by it, which the court felt gave proper effect to natural resource factors (App. App. 44a–49a).[4] An appeal of this order was taken by the government to the Fourth Circuit.

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[3] "App. App." refers to appellants' appendix filed in the court of appeals.

[4] The district court's belief that natural resource factors had to be considered in determining community boundaries was based on its interpretation of 16 U.S.C. 590h(b), which sets forth the basic administrative structure for agricultural pro-

The court of appeals reversed, finding that the district court had "refused to accept the reasonable administrative determination, and instead substituted its own" (Pet. App. 7a). By upholding the community boundaries administratively established, the court of appeals also rejected petitioner's contention that the procedures employed in establishing boundaries were unlawful.

2. The decision of the court of appeals is clearly correct and is not in conflict with any other decision. Review by this Court is thus not warranted.

a. The record fully supports the finding of the court below that the administrative determination of community boundaries was a reasonable one. It is well settled that courts will not interfere with reasonable administrative action and attempt to substitute their judgment for that of an administrative agency

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grams and requires the Secretary to designate "local administrative areas." The court ruled that the broad policy considerations of 16 U.S.C. 590g(a) must be read into every part of 590h(b), and therefore concluded the following policies, among others enumerated in 590g(a), must be considered in determining "local administrative areas": preservation and improvement of soil fertility; promotion of the economic use and conservation of land; and the diminution of exploitation and wasteful and unscientific use of soil resources (App. App. 13a).

The government argued that the statutory provisions, legislative history, and long-standing administrative practice demonstrate that community boundaries were to be determined solely by the requirements of efficient administration, without consideration of natural resource factors. The court of appeals, making clear that it was in no way approving the position of the district court that consideration of natural resource factors was required (Pet. App. 6a), found it unnecessary to decide the issue, since, in the court's view, such factors had in fact been taken into account by the State Committee in establishing the new boundaries (Pet. App. 6a—7a).

on a matter entrusted by statute to the judgment of an agency. See, *e.g.*, *Wilbur* v. *United States*, 281 U.S. 206, 218–219; *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 177; *Ayrshire Corp.* v. *United States*, 335 U.S. 573; *Decatur* v. *Paulding*, 14 Pet. 497 514–517; *Freeman* v. *Brown*, 342 F. 2d 205, 214–215 (C.A. 5); *Sleeth* v. *Dairy Products Co. of Uniontown*, 228 F. 2d 165, 167–168 (C.A. 4), certiorari denied, 351 U.S. 966. Thus, the administrative determination here was properly upheld.

b. Petitioner's contention that the procedures employed in the administrative determination of community boundaries and in the review of such a determination are invalid is without merit. Petitioner's position is based upon a misconception of the powers and duties lawfully assigned to the County, State and Review Committees in administering the tobacco marketing program. Specifically, petitioner argues that any administrative determination of community boundaries must be based upon a record compiled at an evidentiary hearing at which affected persons have an opportunity to call and cross-examine witnesses. However, it is plain that no such right exists.

By statute (7 U.S.C. 1363, 1365–66), only Review Committee determinations must be based upon a record after a full evidentiary hearing. The jurisdiction of the Review Committee, however, is limited, and has uniformly been construed as being restricted to those matters which a County Committee has authority to determine. See 7 C.F.R. 711.12; *Fulford* v. *Forman*, 245 F. 2d 145 (C.A. 5); *Morrow* v. *Clayton*, 326 F. 2d 36 (C.A. 10); *Allen* v. *David* 334 F. 2d 592, 596 (C.A. 5); *Chandler* v. *David*, 350 F. 2d 669 (C.A.

5).[5] certiorari denied, 382 U.S. 977; *Rakestraw* v. *Winchester*, 254 F. Supp. 729 (M.D.N.C.). The County Committee has no authority to establish community boundaries—this duty has been delegated by the Secretary solely to the State Committee (7 C.F.R. 7.7). Thus, since the County Committee has no jurisdiction to determine community boundaries—it merely ascertains the location of particular farms within boundaries established by the State Committee—the Review Committee cannot properly review their location. And the State Committee, having sole authority for setting community boundaries, is subject to no requirement that its determinations be based only upon evidence adduced at an evidentiary hearing (see 16 U.S.C. 590h(b); 7 C.F.R. 7.7; compare 7 U.S.C. 1363, 1365–66). Accordingly, in determining community bound-

[5] Petitioner's reliance on the Fifth Circuit's decision in *Chandler* (Pet. 23–25) is misplaced. There a farmer challenged the authority of the Review Committee to determine the validity of certain transfers of cotton acreage allotments. In upholding the Review Committee's jurisdiction, the court pointed out that the statute "gives to the County Committee primary authority to approve a transfer of allotments from an eminent domain pool," and that "it may cancel transferred allotments which it finds were obtained by misrepresentation" (350 F. 2d at 676). Since the matter was one "properly to be considered by the County Committee * * *," the Review Committee had jurisdiction to review that body's determination, the court concluded (*id.* at 677). Thus, *Chandler* is plainly distinguishable from the instant case, for it cannot be maintained that the County Committee had authority to establish community boundaries. Indeed, the passage from the *Chandler* opinion quoted out of context by petitioner (Pet. 24–25) is directed toward distinguishing cases where the State Committee had exercised authority, so that Review Committee jurisdiction was lacking. When the *Chandler* opinion is read as a whole it is clear that it is not inconsistent with the decision of the court below.

aries, the State Committee was not required to restrict itself to evidence adduced at an evidentiary hearing.

Finally, establishment of the boundaries of "local administrative areas" by the Secretary of Agriculture is hardly a matter as to which an individual has a constitutional right to a hearing after notice, or one which, either constitutionally or statutorily, is required to be made upon the basis of a record.[6] Petitioner's due process contentions (Pet. 4, 16) are thus without merit; he had no right of cross-examination regarding the statement of the State Committee which accompanied the filing of the new community boundaries in compliance with the district court's order (see *supra*, p. 4). Indeed, although such a statement was not required, providing the district court with a written explanation of the considerations underlying the new boundaries established by the State Committee seems quite desirable.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1967.

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[6] *E.g.*, *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441; 1 Davis, *Administrative Law Treatise* §§ 6.06, 7.04–7.06 (1958); 5 U.S.C. (Supp. II) 553–554. Rather, such a determination involves action which is essentially legislative in character, taken pursuant to specific congressional authorization for the Secretary to so proceed (see note 1, *supra*). See *Highland Farms Dairy* v. *Agnew*, 16 F. Supp. 575, 586–587 (E.D. Va.), affirmed, 300 U.S. 608; *George A. Rheman Co.* v. *United States*, 133 F. Supp. 668, 673–675 (E.D. S.C.).

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